No. 11712

United States
Circuit Court of Appeals
For the Ninth Circuit

T. J. SMITH,

Appellant,

vs.

L. M. WHITE, et al.,

Appellees.

OPENING BRIEF OF APPELLANT

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APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

This is an appeal from an order of the United States District Court for the District of Arizona, dismissing a petition for relief under Section 75 of the Bankruptcy Act (U. S. C. Title 11, Chapter 8, Section 203) "on the grounds and for the reason that he (the appellant) is not a farmer within the meaning of Section 75 of the Bankruptcy Act." (T. R. 77.)

Appellant's petition for relief was filed March 14, 1947 (T. R. 2) and approved by the District Judge March 24, 1947. (T. R. 23.) The order of dismissal was entered June 4, 1947. (T. R. 77.) Notice of

appeal was filed July 2, 1947 (T. R. 78) and cash appeal bond given July 28, 1947. (T. R. 79.)

The jurisdiction of the District Court was invoked under Section 75 of the Bankruptcy Act, above referred to, and jurisdiction of the Circuit Court of Appeals to review the offending order is conferred by subsection (n) of said Section 75 as well as by Section 24 (a) of the Bankruptcy Act (U. S. C. Title 11, Chapter 4, Section 47).

STATEMENT OF THE CASE

But one question is presented by this appeal: Does the evidence establish that the appellant is a farmer within the meaning of Section 75 of the Act of Congress relating to bankruptcy?

The question was first presented by the appellees by objection before the Conciliation Commissioner, (T. R. 40) to whom the matter had been referred. (T. R. 23.) The Conciliation Commissioner, in his report to the District Judge, stated:

> "That at the meetings of said creditors the secured creditor, L. M. White, and Tucson Realty and Trust Co., a non-secured creditor, objected to the proceedings upon the ground that the Court was without jurisdiction to proceed under Section 75 of the Bankruptcy Act in this matter, for the reason and upon the ground that the debtor had failed to prove that he was a farmer and entitled to the benefits of said Act.

"As the record now stands, your Conciliation Commissioner is of the opinion that he has no authority or power to determine the jurisdictional question presented and hence makes no findings or conclusions in reference thereto." (T. R. 40.)

Upon the filing of such report by the Conciliation Commissioner, the District Judge issued an "Order to Show Cause," the concluding paragraph of which reads:

"It Is Therefore Ordered that T. J. Smith, petitioner herein, appear before this court on the 14th day of May, 1947, at the hour of ten o'clock a. m., to show cause why the objection to the jurisdiction of this court should not be sustained and the case dismissed upon the ground and for the reason that said petitioner is not a farmer within the meaning of Section 75 of the Bankruptcy Act." (T. R. 42.)

Further evidence was adduced before the District Judge (T. R. 83-99) from which he concluded that appellant was not a farmer within the intent of the Act and dismissed the entire proceeding. (T. R. 77.)

SPECIFICATION OF ERROR

The District Court erred in dismissing the appellant's petition for relief, and in dismissing the proceeding, because under all the evidence and the law thereunto applicable, the appellant is a "farmer" within the meaning and intent of Section 75 of the Act of Congress relating to bankruptcy, and as such is entitled to relief under said Act. (T. R. 100.)

ARGUMENT

Appellant Is a "Farmer" Within the Contemplation of Section 75 of the Bankruptcy Act

The evidence before the Conciliation Commissioner (T. R. 48-77) and before the District Judge (T. R. 85-98), so far as it relates to the question presented by this appeal, may be thus summarized:

Appellant has been a farmer all his life. (T. R. 85.) He owns a farm of 1,280 acres in Pima County, Arizona, one section of which he acquired by homestead entry in 1932 or 1933 and the balance he later acquired. (T. R. 86.) He has lived on such farm, and actively and personally farmed the same, continuously since the year 1938, (T. R. 49) except that during the year 1944 he leased a portion of the farm to a tenant. (T. R. 63, 71, 72, 87.) But even during that year he resided on the farm and did some leveling work upon the unleased portion. (T. R. 72.)

During the war emergency, while many air fields were being constructed in Arizona, he took some contracts, or subcontracts, for the clearing and grading of certain of the air bases. (T. R. 96.)

In 1943 appellant quit the contracting business and disposed of his equipment. (T. R. 50, 73.)

During all the time appellant was engaged in contracting he was also engaged in his farming activities, through almost daily supervision of the work performed by the farm employees. (T. R. 71, 72.) Appellant's principal income for all the years concerned herein has been derived from the farm, (T. R. 76) and it is doubtful if the contracting venture furnished any net income whatever. (T. R. 76.) The greater portion of appellant's financial difficulties grew out of his contracting venture, but not all of his indebtedness arose therefrom—some resulted from farming. (T. R. 88, 89.) Since 1944 appellant's sole source of income has been the farm, (T. R. 76) as he has been exclusively engaged in and personally operating the farm since that time. In fact, up until he filed his petition for relief on March 14, 1947, he was engaged in preparing his land for the 1947 planting and was only prevented from actual planting by the stress of financial difficulties brought about by pressing creditors. (T. R. 87, 88.)

Whether or not such evidence shows the appellant to be a farmer, within the meaning of the Act, must be determined from reading of the statute and the decisions of the courts construing it.

This court, in *In re Moser,* 95 F. 2d 944, employed the following language.

> "The first question raised is whether debtors are farmers within the meaning of the act. Section 75(r), as amended, 11 U. S. C. A., par. 203(r) states: 'For the purposes of this section . . . the term "farmer" includes not only an individual who is primarily *bona fide* personally engaged in producing products of the soil, but also any individual who is primarily *bona fide* personally engaged in dairy farming, the production of poultry or livestock, . . . or the principal part of whose income is derived from any one or more of the foregoing operations.'
>
> "It seems that debtors should be considered farmers both because they (or the husband) personally engage in the farming operations, and because the principal part of the income is derived therefrom. The fact that the ranch house is leased to a tenant is not controlling." *First Nat. Bank vs. Beach,* 301 U. S. 435, 57 S. Ct. 801, 81 L. Ed. 1206.

In deciding *Shyvers vs. Security First National Bank,* 108 F. 2d 611, the court took occasion to point out that such decision did not overrule its prior holding in the *Moser case,* saying:

> "Nor is our decision herein contrary to our holding in *In re Moser,* 9 Cir., 1938, 95 F. 2d 944. In the *Moser case,* as in the *Beach case,* the debtor was held to have personally engaged in farming operations. We simply held that the fact that the

ranch house itself was leased to a tenant did not take the debtor out of the classification of 'farmer.' "

It is submitted, however, that neither the *Moser case* nor the *Shyvers decision* is precisely in point with the facts of the matter now before the court for review, and that the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Stoller vs. Cleveland Trust Company,* 133 F. 2d 180, is based upon a factual situation more nearly approaching that presented by the record here. In the *Stoller case,* the court said:

"The appellant regularly did a considerable portion of his farm work and personally directed the operations of farms owned or rented by him. He threshed his own crops and those of some of his neighbors and, as an outgrowth of these combined operations, he started a small seed business, the gross volume of which was some two or three thousand dollars for the first year. In the course of sixteen years, his seed business reached a peak of over $350,000 in gross volume. The seed business exacted increasing demands upon his time, until he devoted somewhat more than half of his working hours to its care. During the rush season, the major portion of his time was devoted to this seed business, and during the slack season his farming operations were paramount in time consumption. At no time did he abandon active duties on his farm. He saw to the upkeep of improvements and the maintenance of the fertility

of the soil which he farmed and, as the master put it, 'followed all the practices of good husbandry.'

. . .

"The Act of Congress invoked by appellant must be liberally construed to give the debtor the full measure of relief afforded by Congress, 'lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.' *Wright vs. Union Central Life Insurance Co.,* 311 U. S. 273, 279, 61 S. Ct. 196, 200, 85 L. Ed. 184. See, also, *John Hancock Mutual Life Insurance Co. vs. Bartels,* 308 U. S. 180, 60 S. Ct. 221, 84 L. Ed. 176; *Kalb vs. Feuerstein,* 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. 370; *Chapman vs. Federal Land Bank of Louisville, Ky.,* 6 Cir., 117 F. 2d 321, 325.

"The Supreme Court, in *First National Bank vs. Beach,* 301 U. S. 435, 438, 439, 57 S. Ct. 801, 803, 81 L. Ed. 1206, has declared that, in determining in every case of this character whether the petitioner is a farmer because 'personally *bona fide* engaged primarily in farming operations' or because 'the principal part of his income was derived from farming operations,' the totality of the facts must be considered and appraised. The Supreme Court would not attempt to fix the meaning of either of the two branches of the definition considered in the abstract, saying that the two are not equivalents but are used by way of contract. The words 'primarily engaged' in the first branch of the definition, and the words 'income derived

from farming operations' in the second, were said not to constitute terms of art. Mr. Justice Cardozo wrote: 'A farmer remains a farmer, just as a lawyer remains a lawyer, though the returns of his investments, while not enough to keep him going, are larger, none the less, than the profits of his labor. . . . We emphasize the fact afresh that the words of the statute to which meaning is to be given are not phrases of art with a changeless connotation. They have a color and a content that may vary with the setting. (Citing cases.) In the setting of this enterprise, the totality of its circumstances, the roots of the respondent's income go down into the soil.'

"So, in the setting of the case here for decision and the totality of its circumstances, the roots of appellant's income would seem to go down into the soil. He is, therefore, entitled in full measure to the relief provided by the Act of Congress of May 15, 1935, c. 114, Sec. 3, 49 Stat. 246, 11 U. S. C. A., par. 203, sub. r."

In the *Stoller case,* the debtor was actually engaged in farming at the time of his filing his petition for relief. Likewise, was the appellant here. In the *Stoller case* the debtor was engaged in an outside activity, namely the seed business, up to the time of filing his petition. In this appeal the debtor (appellant) was not and had not since 1943 been engaged in any activity except farming. In the *Stoller case,* Mr. Stoller had been for a number of years a *bona fide* farmer. He extended his activities to include another business

which quickly grew to large proportions and tumbled into a maze of debt. The same experience befell the debtor appellant herein. Mr. Smith, in an effort to do his part of the war effort, ventured out upon a contracting venture which proved to be most unfortunate so far as financial considerations are concerned. The lower court in the *Stoller case* held that Stoller's principal income prior to his filing his petition for relief had been derived from the seed business, and that the substantial portion of his indebtedness arose out of the seed business and that, therefore, Stoller could not qualify as a farmer within the meaning of Section 75 of the Bankruptcy Act. On appeal, the Circuit Court of Appeals reversed the decision of the trial court, holding that the debtor was a farmer within the meaning of said Section 75 and was therefore entitled to the relief offered to such debtors under the act. The court held that, however varied his activities, it was apparent from the record that the industrious appellant applied a most substantial portion of his time to the work of a "dirt farmer"; that the appellant's income from the seed business and farm were not segregated; that his financial difficulties arose out of the seed business; that his farming operations were profitable; that he made money from his farm, and the fact that the preponderance of his debts were weighed upon him from the seed business was corroborative of his assertion that the principal part of his income was derived from farming.

Appellees, in their memorandum to the trial court (T. R. 42, 44), made great moment of the fact that the seed business and farming could be related businesses, pointing out this idea as a reason for the courts being led to decide that Stoller was a farmer. In reading the opinion of the court in that case, the appellant is unable to find anywhere in it any indication that the court considered the two activities of Stoller —namely, farming and his seed business, as anything but separate and distinct enterprises. The controlling factors in the case, which resulted in the decision, were the fact that Stoller was actually a "dirt farmer" personally engaged in farming activity at the time he filed his petition, plus the fact that the principal portion of the Stoller income (profits) was derived from his farming activities. The nature of the debtor's indebtedness and the fact that it arose out of the seed business had no bearing whatever. The debtor was a *bona fide* farmer and that was all that was necessary.

Appellant is unable to conceive a situation more directly in point with the facts of his case than that present and controlling in the *Stoller case.* The nature of the indebtedness in the *Stoller case* did not overshadow, there, the appellant's status as a farmer.

In *In Re Linsey,* 41 F. Supp. 948, the court held that one who is primarily personally and in good faith engaged in farming need not spend all of his time therein or refrain from engaging in secondary activities in order to be a "farmer" within Section 75 of the Bankruptcy Act.

In *In Re Horner,* (C. C. A. 7) 104 F. 2d 600, it is held that Horner was a farmer within the meaning of Section 75 of the Bankruptcy Act because he was engaged in producing products of the soil and deriving the principal part of his income therefrom, even though he did obtain other income from other activities. The court said the proper test under the language of the act must be "was the petitioner either primarily *bona fide* personally engaged in producing products of the soil, or was the principal part of his income derived from his activities in producing products of the soil."

The attention of the court is also respectfully invited to *Leonard vs. Bennett,* 116 F. 2d 128, and *Noble vs. Hopewell National Bank,* 98 F. 2d 623.

Of course, the debtor's status as a farmer is to be determined as of the time of the filing of his petition for relief and not at any time prior thereto. As authority for this contention, appellant submits the following language from *Milligan vs. Federal Land Bank of Omaha,* (C. C. A. 8) 129 F. 2d 438:

> "We find nothing in that contention and showing which makes her a farmer within the meaning of the term as defined by Congress. That definition (Subsection r), covers the full scope of Congressional liberality and indulgence. The record in this case, viewed in the light most favorable to the debtor, contains nothing which would justify an inference that the debtor, *at the time she filed her petition,* was '*bona fide* primarily and per-

sonally engaged' in farming operations or the production of agricultural products or that she derived any income whatever from the operation of the farm which she owned and leased."

Again, in deciding *Jordan vs. Federal Land Bank,* (C. C. A. 8) 139 F. 2d 203, 204, the court said:

> "The important question presented by this appeal is whether the determination by the Supervising Conciliation Commissioner and by the District Court that the debtor (appellant), *at the time he filed his petition* under Section 75 of the Bankruptcy Act, 11 U. S. C. A. 203, was not a farmer within the definition of Section 75, sub. r of the Act, 11 U. S. C. A. 203 sub. r, is erroneous."

In the *Jordan case* the debtor had ceased to live on his farm or to work thereon and had for some time lived in town. He spent the rentals, and did not attempt to pay the taxes, or make any repairs upon the farm, or to reduce the mortgage indebtedness thereon. There was no evidence that he ever intended to return to the farm. Therefore, in holding that the debtor was not a farmer within the meaning of the Act at the time of filing his petition, the court said, 139 F. 2d 203, 206:

> "We need not decide whether the debtor could have qualified as a 'farmer' had the District Court adopted the view that his leasing of the ranch was a mere temporary expedient to enable him to meet pressing financial needs, and that it was his *bona fide* intention to resume operating the ranch himself as soon as possible. The Supervising Con-

ciliation Commissioner and the District Court both rejected that view of the evidence."

In the light of the language of the court in the two cases just cited, we submit that the proper time at which facts pertaining to the question whether T. J. Smith was a farmer or not are to be drawn from the time of his filing a petition for relief.

Appellant concedes that the evidence establishes that the larger portion of his indebtedness arose out of an unfortunate venture into the contracting business, and that while his farming activities made a profit, his contracting venture resulted in unfortunate and heavy losses. However, the nature of the principal portion of his indebtedness does not control his status as a farmer for, as above demonstrated, never once during the entire period here involved did appellant cease to be actively and personally engaged in the operation of his farm; never once did he cease to live thereon and never was his principal source of income derived from anything other than farming.

CONCLUSION

It is most respectfully insisted that all of the evidence in the case demonstrates conclusively and without contradiction that appellant was a farmer within the contemplation of the act, and that the order dismissing his petition for relief was erroneously entered and should be reversed.

Respectfully submitted,

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